

Decision 02-12-013 December 5, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Sempra Communications (U 6282 C) for A Certificate of Public Convenience and Necessity In Order to Provide Competitive Local Exchange and Interexchange Services.

Application 00-02-020
(Filed February 11, 2000)

**ORDER GRANTING APPLICATION OF SEMPRA
COMMUNICATIONS (U 6282-C) FOR CERTIFICATE
OF PUBLIC CONVENIENCE AND NECESSITY**

By this order, we grant the application of Sempra Communications (Sempra) for an expanded Certificate of Public Convenience and Necessity (CPCN) for authority to construct fiber optic telecommunications facilities within its California service territory.

Background

On October 1, 1999, Sempra filed a petition in Investigation (I.) 95-04-044 for a CPCN to provide, on a statewide basis, facilities-based and resold competitive local exchange, access and interexchange services. In that petition, Sempra provided the information required by Rule 18 for providing those statewide services. In Decision (D.) 99-12-048 (December 16, 1999), the Commission granted Sempra a CPCN as a competitive local exchange carrier to offer resold local exchange services in the service territories of Pacific Bell

(Pacific), GTE California Incorporated (GTEC),¹ Roseville Telephone Company (RTC), and Citizens Company (CTC), for those petitioners as set forth in and inter Local Access and Transport Area (LATA) and intraLATA authority on a statewide basis. Pursuant to an Administrative Law Judge (ALJ) Ruling of February 11, 2000, Sempra's petition was converted to an application, and assigned Application (A.) 00-02-020 filed effective February 11, 2000. In D.00-06-019 (June 8, 2000), the Commission granted the joint motion of Sempra and the Commission's Office of Ratepayer Advocates (ORA) requesting that Sempra be granted limited facilities-based local exchange authority. The CPCN that was granted in D.00-06-019 permitted Sempra to provide competitive local exchange telecommunications services utilizing unbundled network elements and equipment installed solely within or on existing buildings and structures within the service territories of Pacific, Verizon, RTC and CTC. The decision further stated that authorization for expanded facilities-based authority involving construction work would require conformance with California Environmental Quality Act of 1970 (CEQA)² requirements. The application was left open for further consideration of Sempra's request for expanded facilities-based CPCN authority.

CEQA Compliance

In accordance with CEQA provisions, the Commission must assess the potential environmental impact of a competitive local carrier's (CLC) proposed operation in order to determine that adverse effects are avoided, alternatives are

¹ GTE California, Inc. has since changed its name to Verizon California, Inc.

² Ca. Pub. Res. Code §§ 21000 et seq. and 14 Ca. Code of Reg. §§ 15000 et seq.

investigated and, where applicable, environmental quality is restored or enhanced as necessary. To achieve this objective, Rule 17.1 of the Rules of Practice and Procedure requires the proponent of any project subject to Commission approval to submit with its application for approval of such project a Proponent's Environmental Assessment (PEA). The PEA is used by the Commission to focus on any impacts of the project which may be of concern, and to prepare the Commission's Initial Study to determine whether the project needs a Negative Declaration or an Environmental Impact Report (EIR).

On June 8, 2000, Sempra filed a supplement to the Proponents Environmental Assessment (Supplemental PEA) in its application for a CPCN. Sempra filed its Supplemental PEA in order to address the potential impact on the environment of Sempra's application for statewide authority for an expanded facilities-based CPCN. The Supplemental PEA does not address any specific construction project proposed by Sempra, but provides a programmatic evaluation of the types and characters of activities Sempra may conduct under its requested expanded facilities-based CPCN authority. Specifically, the Supplemental PEA evaluates the type of facilities, construction projects, construction methods, locations, and operations likely to be undertaken by Sempra under expanded facilities-based CPCN authority, and the potential for those activities to affect the environment where they are located. The Supplemental PEA also addresses the standards for avoiding, minimizing, and mitigating any effects to a less than significant level.

Because Sempra does not address any specific construction project or network, the Commission's Environmental Review Section staff used the framework of a Program EIR to broadly analyze the effects of project

implementation that could be anticipated to occur as a result of the Commission approval of Sempra's CPCN request.

The Commission completed a Draft Environmental Impact Report (DEIR) for Sempra's project, and filed a Notice of Completion (NOC) with the Governor's Office of Planning and Research, State Clearinghouse. A Notice of Availability (NOA) was published and the DEIR was made available for a 45-day public review on June 15, 2000. The DEIR was distributed to responsible and trustee agencies including all city and county planning departments, community development departments, or city hall/city managers (for those cities too small to have a designated planning department) included in the project area. A Public Notice was also published in five general circulation newspapers announcing the availability of the document for public review in compliance with CEQA.

Agency meetings on the DEIR were held on August 12, 13, 14 and 15, 2002, in San Francisco, San Diego, Los Angeles, and Sacramento, respectively, and the public review and comment period on the DEIR ended on September 10, 2002.

As the lead CEQA agency, the Commission prepared a response to all written comments received on the DEIR during the public review period. The response to comments and text changes, together with the DEIR, constitutes the Final EIR (FEIR) upon certification by the Commission as complete and adequate under the CEQA.

Environmental Impacts

The Final Program EIR identified a number of potentially significant environmental effects (or impacts) that the project will cause. Some of these effects will be fully avoided through the adoption of feasible mitigation measures. Other effects can be substantially lessened, but not fully avoided, and therefore remain significant and unavoidable.

The proposed project would have potentially significant effects on biological and cultural resources, air quality, water quality, land use, aesthetics, agriculture, traffic, and noise. The majority of the project impacts result from construction activities and are considered to be temporary impacts. Mitigation proposed as part of the project, as well as measures identified in this Final Program EIR, would avoid or reduce most of the impacts to a less-than-significant level. However, the project could still result in significant unavoidable environmental impacts. The following significant adverse affects would be unavoidable, even with the implementation of the mitigation measures proposed as part of the project and identified in the Final Program EIR:

- Impact HYD-4: Possible water quality degradation and siltation from accidental seepage or spillage of drilling fluids into streams. The Final Program EIR identified, and the Commission will impose, the following mitigation measure to reduce or avoid water quality impacts to the maximum extent possible.
 - o HYD-4a: A mitigation protocol outlined in detail in the Final Program EIR will be implemented to minimize the potential for drilling fluid seepage to streams and to ensure containment of drilling fluids within the drilling circulation system. The protocol includes pre-staging of materials and equipment to effect containment, damming, and cleanup. System pressure and visual monitoring will be implemented and immediate cessation, containment, recovery, and restoration activities will be implemented, including any reporting and coordination activities required by resource agency permits.
- Impact AIR-2: Emissions from construction activities could add to the regional pollutant loading of the area in air basins where air districts have set significance thresholds for both

project construction and operation. The Final Program EIR identified, and the Commission will impose, the following mitigation measures to reduce or avoid air impacts to the maximum extent possible.

- o AIR-2a: Sempra Communications would require its construction contractors to comply with the following requirements during project construction:
 - Use of California on-road diesel fuel for all diesel-powered construction equipment
 - Use of construction equipment that is properly tuned and maintained in accordance with manufacturers' specifications
 - Use of best management construction practices to avoid unnecessary emissions
 - Suspension of emissions-generating construction activities during "Stage 2" smog alerts.
- o AIR-2b: To the extent feasible, Sempra Communications would employ a maximum number of work crews on any given workday, such that daily, quarterly, or annual levels of significance for each air district shown on Table 4.3.11 in the Final Program EIR are not exceeded.
- o AIR-2c: For subsequent activities where implementation of mitigation measure AIR-2b is not feasible, Sempra Communications would require the prime construction contractor to use aqueous emulsified fuels instead of diesel fuel.
- Cumulative: The project's impacts would not be considerable with the exception of significantly unavoidable cumulative impacts that may occur with respect to air quality where applicable mitigation measures are not

feasible to reduce the residual impact of construction emissions below significance thresholds.

Based on the analysis conducted in the Final Program EIR, with the exception of the two identified impacts on water quality and air quality, the proposed project would potentially have short-term significant impacts during construction that may be avoided or reduced to less-than-significant levels with the mitigation measures in the Final Program EIR. The Commission, finds therefore that the project described in the Final Program EIR may potentially result in short-term, significant effects that could be unavoidable during construction activities with regard to possible water quality degradation from accidental spillage of drilling fluids into sensitive streams, and an increase in vehicular emissions from construction activities that could potentially add to the regional pollutant loading in the Sacramento Metropolitan, the South Coast, and the Imperial County air basins. Although the project may potentially result in short-term unavoidable impacts, no long-term effects will result from the project.

With reference to the above listed significant adverse impacts, and as authorized by the Public Resources Code Sections 21000, et seq. and Title 14, California Administrative Code Sections 15091, 15092, and 15093, the California Public Utilities Commission, in considering the Final Program EIR for the project, makes the following findings for which there is substantial evidence in the record.

With regard to the significant adverse impacts upon aesthetics; agricultural resources; biological resources; cultural resources; geology, soils and seismicity; hazards and hazardous materials; land use and planning; noise; recreation; transportation and traffic; and utilities and service systems, the project impacts can be reduced to less than significant levels with the

implementation of the adopted mitigation measures. With regard to the potential significant adverse impacts associated with water quality and construction related air quality impacts, the impacts are significant and unavoidable, albeit temporary.

Statement of Overriding Considerations

Notwithstanding the disclosure of the potentially significant adverse impacts to water quality and air quality as described and evaluated in the Draft and Final Program Environmental Impact Reports for the subject project and as described above, the Commission has determined, pursuant to Section 15093 of the State of California CEQA Guidelines, that the benefits of the project outweigh the adverse impacts and that the project should be approved. The Commission specifically finds that there are specific social, economic and other reasons for approving this project, and that there is substantial evidence in the record to determine that the benefits of the project outweigh the adverse impacts and that the project should be approved. Pursuant to this finding, the California Public Utilities Commission has prepared and certifies this Statement of Overriding Considerations.

The specific social, economic and other reasons for approving this project, which override the unavoidable construction related noise and air quality impacts identified in the findings, are as follows:

- The project will benefit the public good by providing for the development of telecommunications infrastructure and services to selected markets throughout California using state-of-the-art fiber optic cable technology.
- Implementation of the recommended mitigation measures will reduce all but two potentially significant impacts to less than significant levels.

- There is no economically or technically feasible alternative that avoids adverse environmental impacts.

Approval of the Proposed Expanded CPCN

By the instant order, we hereby approve and adopt the Final Program EIR prepared by the Commission Environmental Review Section.

The Program EIR incorporates a process for further Commission review and authorization before any actual project construction, triggered by a “Notice to Proceed” (NTP). To initiate the NTP process, Sempra must submit to the Commission Energy Division, Environmental Review Section the proposed route-specific construction plans and a detailed description of the proposed activity in the form of a work plan, containing, at a minimum, the information set forth in FEIR Work Plan Submittal Requirements. The work plan must contain, at a minimum, the information items set forth in Appendix A, Attachment A of the FEIR.

Concurrent with submission of the work plan, Sempra must submit a checklist documenting the evaluation of the environmental effects of the work plan to determine whether those effects were covered in the Program EIR and which mitigation measures would apply and be required for implementation of the work plan. If the results of the checklist indicate that the environmental effects were not covered in the Program EIR, then Sempra must either revise the work plan to avoid such effects or formally file a new complete application with the Commission’s Docket Office to modify its existing CPCN. The Program EIR will not provide CEQA compliance for unauthorized projects outside the scope of the document nor supercede the permitting authority for other regulatory jurisdictions on any level of government including local, state and federal.

Sempra's application was previously reviewed and found to be in compliance with the certification rules for competitive local exchange carriers in connection with granting Sempra limited facilities-based CPCN authority in D.00-06-019. As previously found in D.00-06-019, applicant demonstrated that it possesses the requisite managerial qualifications, technical competence, and financial resources to provide facilities-based telecommunications service.

In this order, we approve Applicant's request for expanded CPCN authority to provide telecommunications service under the terms prescribed under the FEIR, as approved in this order. Based upon our previous review of certification requirements described in D.00-06-019, coupled with the additional review we have conducted in this phase of the application, we find that good cause exists to approve the expansion of Sempra's previously granted CPCN authority as requested. Accordingly, we grant Sempra expanded CPCN authority pursuant to the terms and conditions required by the approved FEIR and to offer telecommunications service utilizing facilities constructed pursuant to its CPCN.

Comments on Draft Decision

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

Assignment of Proceeding

Carl Wood is the Assigned Commissioner and Thomas Pulsifer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Sempra was granted limited facilities-based CPCN authority pursuant to the terms and conditions in D.00-06-019.

2. Sempra filed a Supplemental PEA to its application seeking an expansion of its limited CPCN for authority to construct and install fiber optic transmission facilities.

3. There are no protests to Sempra's application, including the Supplemental PEA.

4. Because Sempra provides only general information, but does not provide project-specific information in its supplemental PEA, the Commission staff undertook and completed a "Program" EIR which sets forth a process-oriented approach for subsequent Commission approach of project-specific construction activities undertaken by Sempra.

5. The Commission prepared a response to written comments received during the public review period to complete the Final Program EIR submitted by the Director of the Commission's Energy Division.

6. The Final Program EIR concludes that, given the construction approach, design elements, and the additional mitigation measures included therein, no significant adverse impacts on the environment will occur from Sempra's project, except during the construction period, as noted below.

7. Sempra's proposed project may have potentially significant adverse impacts of a temporary nature during the construction activities that could be unavoidable, even with implementation of proposed mitigation measures with regard to possible water quality degradation and siltation from accidental seepage or spillage of drilling fluids into sensitive streams and an increase in vehicular emissions during construction activities that could potentially add to the regional pollutant loading in Sacramento Metropolitan, South Coast, San Diego County and Imperial County air quality management districts.

8. The Sempra Communications Final Program EIR was prepared pursuant to CEQA Guidelines Section 15090 and is adequate for this Commission's decision making purposes.

9. The project will result in significant environmental effects with respect to the following issues or resources that can be reduced to less than significant levels and/or avoided with the implementation of mitigation measures: aesthetics; agricultural resources; biological resources; cultural resources; geology, soils and seismicity; hazards and hazardous materials; land use and planning; noise; recreation; transportation and traffic; and utilities and service systems.

10. Pursuant to Section 15091 of the CEQA Guidelines, the project will potentially result in an environmental effect for water quality impacts that is considered significant and unavoidable. While mitigation measures for potential water quality impacts would substantially lessen the impacts, the measures will not reduce the impacts to a less than significant level.

11. Pursuant to Section 15091 of the CEQA Guidelines, the project will result in an environmental effect for construction related air quality impacts that is considered significant and unavoidable. While mitigation measures for construction related air quality impacts would substantially lessen the impacts, the measures will not reduce the impacts to a less than significant level.

12. Pursuant to Section 15093 of the CEQA Guidelines, there is substantial evidence in the record to determine that the benefits of the project outweigh the adverse impacts and that the project should be approved pursuant to the Statement of Overriding Considerations.

Conclusions of Law

1. Public convenience and necessity warrant the telecommunications services to be offered by Sempra utilizing facilities provided under the Final Program EIR subject to the terms, conditions, and restrictions set forth in this order.

2. The Final Program EIR should be approved and made part of the formal record in this proceeding.

3. Applicant should be granted an expanded CPCN to undertake the project as defined by the Program EIR and to offer facilities-based services utilizing such facilities subject to the terms, conditions, and restrictions set forth below.

4. Except for the temporary effects during the construction period as noted above, it can be seen with certainty that there is no possibility that granting this CPCN will have a significant adverse effect upon the environment.

5. The Sempra Communications Final Program EIR was prepared pursuant to CEQA and is adequate for this Commission's decision making purposes.

6. The Sempra Communications Final Program EIR was prepared pursuant to CEQA and is adequate for this Commission's decision making purposes.

7. Pursuant to Section 15092 of the CEQA Guidelines, the Commission should adopt the mitigation measures identified in the Sempra Communications Final Program EIR, including mitigation measure AIR-2 for air quality impacts and mitigation measure HYD-4 for water quality impacts.

8. Pursuant to Section 15093 of the CEQA Guidelines, there is substantial evidence in the record to determine that the benefits of the project outweigh the adverse impacts and that the project should be approved pursuant to the Statement of Overriding Considerations.

IT IS ORDERED that:

1. An expanded certificate of public convenience and necessity (CPCN) is hereby granted to Sempra Communications (U 6282-C) (Sempra or Applicant) as defined in the Final Program Environmental Impact Report (FEIR) approved herein and subject to compliance with all terms and conditions contained in the FEIR.

2. The FEIR for Sempra's proposed construction project is hereby accepted and approved. An official copy of the FEIR is hereby made a part of the formal record, and shall be included in the formal file for this application.

3. Sempra is authorized to offer telecommunications services using the facilities provided for in the FEIR, contingent on Sempra's compliance with the terms and conditions of the FEIR.

4. The mitigation measures outlined in the Sempra Communications Final Program EIR are hereby made conditions of project approval by this Commission Order.

5. Applicant shall file a written acceptance with the Director of the Telecommunications Division of the amended CPCN granted in this order prior to commencing service utilizing any new facilities covered under this order.

6. Under the terms of the FEIR, Sempra shall not begin construction or undertake any subsequent construction or installation activities without authorization by issuance by the Commission's Energy Division – Environmental Review Section of a Notice to Proceed (NTP) in compliance with the Program EIR.

7. To initiate the NTP process, Sempra must submit to the Commission's Energy Division, Environmental Review Section the proposed route-specific construction plans and a detailed description of the proposed activity in the form

of a work plan, containing at a minimum the information set forth in FEIR Work Plan Submittal Requirements.

8. Sempra Communications will enter into an agreement with the Commission to reimburse the Commission for any and all costs associated with the review, implementation and monitoring of subsequent project actions associated with the filing of Construction Workplans and requests for a Notice to Proceed.

9. The terms, conditions, exemptions, and requirements of service adopted for Sempra in D.00-06-019 with respect to its limited facilities-based authority shall also apply in like manner to service offered by Sempra under the expanded facilities-based authority granted in the instant order.

10. The previously assigned corporate identification number of Sempra shall be included in the caption of all original filings with this Commission, and in the titles of other pleadings filed in existing cases.

11. If the environmental effects of the work plan were not covered in the Program EIR, then Sempra must either revise the work plan to avoid such effects or shall formally file a new complete application with the Commission's Docket Office to modify its existing CPCN.

12. Application 00-02-020 is closed.

This order is effective today.

Dated December 5, 2002, at San Francisco, California.

HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners

President Loretta M. Lynch, being necessarily absent,
did not participate.